Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

ANN A. MERGENS, et al.,

Petitioners,

v.

ALEX W. DREYFOOS, JR., et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the validity of a release, when raised as a defense to claims arising under the federal securities laws, is determined by state law or by uniform federal law?

PARTIES TO THE PROCEEDING

Pursuant to Sup. Ct. R. 14.1(b), Petitioners list below all parties to the proceeding in the Court of Appeals:

(1) Alex W. Dreyfoos, Jr.

(2) Carolyn B. Dreyfoos

(3) Mary Mergens Loughran

(4) Ann A. Mergens (individually and as Trustee of the Ann A. Mergens Revocable Trust)

(5) Paul Mergens

(6) D.E. "Josh" Murray

(7) Photo Electronics Corporation

(8) Photo Electronics Company, L.P.

None of the filing parties is a corporation.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Ann A. Mergens,[1] Paul Mergens and Mary Mergens Loughren respectfully pray that this Court issue a Writ of Certiorari to review the February 3, 1999 judgment and opinion of the United States Court of Appeals for the Eleventh Circuit in this matter.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 166 F.3d 1114, and is reproduced as Appendix A at 1a-11a. The order of the Court of Appeals denying rehearing and rehearing en banc is not reported, and is reproduced as Appendix C (37a-38a). The opinion of the United States District Court for the Southern District of Florida is reported at 1997 WL 611576, and is reproduced as Appendix B (12a-36a).

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals was entered on February 3, 1999. Petitioners' timely petition for rehearing and suggestion of rehearing en banc was denied by the Court of Appeals on April 2, 1999. This Court has jurisdiction to review the judgment of the Court of Appeals by Writ of Certiorari pursuant to 28 U.S.C. § 1254(1).

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[1] Ms. Mergens is a petitioner both in her individual capacity and as the Trustee of the Ann A. Mergens Revocable Trust.

STATUTES INVOLVED

This case involves section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b), and Rule 10b-5 promulgated thereunder, 17 C.F.R. § 240.10b-5. The statute and the rule are set forth as Appendices D (39a) and E (40a), respectively.

STATEMENT OF THE CASE

This Court has long held that the legal effect of a release of federal statutory claims is governed by federal rather than state law. *E.g., Dice v. Akron, Canton & Youngstown R. Co.*, 342 U.S. 359 (1952) (FELA claim). The Ninth, Sixth and Second Circuits have applied that choice-of-law rule to claims arising under the federal securities laws, *Petro-Ventures, Inc. v. Takessian*, 967 F.2d 1337, 1340 (9th Cir. 1992); *Street v. J.C. Bradford & Co.*, 886 F.2d 1472, 1481 (6th Cir. 1989); *Locafrance U.S. Corp. v. Intermodal Sys. Leasing, Inc.*, 558 F.2d 1113, 1115 (2d Cir. 1977),[2] and the Eleventh Circuit itself has applied the same rule in cases arising in other areas of federal law. *See U.S. Anchor Mfg., Inc. v. Rule Indus., Inc.*, 7 F.3d 986, 993 n.11 (11th Cir. 1993)

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[2] In both *Petro-Ventures* and *Locafrance*, the parties' settlement agreement, like the stock repurchase agreement at issue here, contained a choice-of-law provision calling for the application of state law. *See Petro-Ventures*, 967 F.2d at 1340 (settlement agreement called for application of California law); *Locafrance*, 558 F.2d at 1115 n.3 (settlement agreement called for application of New York law). The Sixth Circuit's opinion in *Street* does not reveal whether the release executed by the plaintiff contained a choice-of-law clause.

(antitrust law); *Eatmon v. Bristol Steel & Iron Works, Inc.*, 769 F.2d 1503, 1516-17 (11th Cir. 1985) (Title VII); *Parker v. DeKalb Chrysler Plymouth*, 673 F.2d 1178, 1180 (11th Cir. 1982) (Truth in Lending Act). As the Eleventh Circuit concisely explained in *Parker*: "[I]ssues relating to the validity of and defenses to purported releases of federal statutory causes of action are matters of federal law." 673 F.2d at 1180.

In the face of this overwhelming authority, the Eleventh Circuit has chosen to adopt a special choice-of-law rule in cases involving the validity of a release of federal securities claims. The Court of Appeals held in this case that issues involving the validity of and defenses to purported releases of federal securities claims are matters of *state* law. *Mergens v. Dreyfoos*, 166 F.3d 1114, 1117 & n.1 (11th Cir. 1999) (App. 5a) (citing *Finn v. Prudential-Bache Securities, Inc.*, 821 F.2d 581, 586 n.5 (11th Cir. 1987), and *Pettinelli v. Danzig*, 722 F.2d 706, 709 (11th Cir. 1984)). That holding is in conflict with this Court's precedents and with the holdings of three other circuits, and should be reviewed by this Court.

A. Statement of Facts

Photo Electronics Corporation ("PEC") was founded in 1963 by George Mergens. After Mr. Mergens' untimely death in an automobile accident in 1986, his wife and children (Petitioners here) inherited his 38% interest in the company. Almost immediately after Mr. Mergens' death, Respondent Alex Dreyfoos, who owns a majority interest in PEC, began to make overtures to Mrs. Mergens regarding his desire to purchase the Mergenses' interest

in the company. R2-17-3, ¶ 12.[3] Those overtures were initially rejected. In the succeeding years, Petitioners were denied access to the company's books and records and given little or no information about the company's business and affairs. R2-17-5, ¶ 17. When they were finally allowed to inspect certain of PEC's records, Petitioners concluded that Respondents were guilty of mismanagement and fraud. *Id.* ¶ 18.

On January 17, 1994, as a means of resolving their dispute, Petitioners and Respondents entered into a written stock repurchase agreement under which Respondents purchased Petitioners' 38% interest in PEC for $3 million in cash and a promissory note payable over 8 years. R2-17, Ex. 1. The stock repurchase agreement included a written representation by Respondents that they had no current intention of selling PEC or its assets, and the parties agreed that this representation was intended "[a]s an inducement to [Petitioners] to enter into this Agreement." That representation was false, and was known to be false, on the day it was made. R2-17-15, ¶ 51.

The purchase price of Petitioners' shares was based on company valuations conducted by outside professionals, which were in turn based on cash flow data and projections supplied by Respondents. R2-17-11-12, ¶¶ 40, 42-43. Those data and projections were inaccurate and misleading; Respondents failed to disclose that they had

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[3] Citations in the form "R1-2-3" are to volume 1, document 2, page 3 of the record on appeal. R2-17 is Petitioners' Amended Complaint, the allegations of which are taken to be true for purposes of this appeal.

artificially suppressed the company's cash flow in order to minimize the valuations and thereby minimize the amount they were required to pay for the Mergenses' stock. Had the Mergenses known that Respondents intended to sell the company, or that the company's cash flow had been artificially suppressed, they would not have sold their stock or they would have demanded a higher price. R2-17-14-15, ¶¶ 48-51.

The stock repurchase agreement also included a general release and a boilerplate choice-of-law provision stating that the agreement would be governed by Florida law.

In September 1995, Respondents contacted the Mergenses and offered to accelerate payment of the promissory note. R2-17-7, ¶ 27. The Mergenses accepted. The following day, some 20 months after the close of the stock repurchase, Petitioners learned that WPEC-TV (a West Palm Beach television station that was PEC's principal asset) had been sold for roughly $150 million – more than four times the valuation on which the purchase price of the Mergenses' stock was based. R2-17-8, ¶¶ 29-30. Such a change in valuation over such a short period of time is unprecedented and can only be explained as a result of intentional manipulation of the company's cash flow by PEC's insiders. R2-17-15-18, ¶ 52.

Having learned of Respondents' fraud, Petitioners immediately tendered the funds they had received from Respondents for Petitioners' stock and offered to rescind the transaction. R2-17-8, ¶ 32. Their offer was rejected. R2-17-8, ¶ 33.

This action was filed in December 1995 in the United States District Court for the Southern District of Florida. Petitioners asserted three claims under Securities and Exchange Commission Rule 10b-5 and two pendent claims under Florida common law. Jurisdiction in the district court was based on 15 U.S.C. § 78aa and 28 U.S.C. § 1331.

B. The District Court Decision

Without allowing discovery, the district court granted Respondents judgment on the pleadings on the basis of the general release contained in the parties' stock repurchase agreement. R4-114 (App. 12a-36a).

The district court first concluded that Petitioners' three federal securities claims were barred by the general release notwithstanding Petitioners' allegation – accepted as true for purposes of Respondents' motion – that the release was procured by fraud. In so ruling, the district court effectively held that a release is effective to bar a Rule 10b-5 claim even if the release is the direct result of the defendant's illegal securities fraud.[4] Having disposed of the federal claims, the district court turned to Petitioners' claim for common-law fraud and ruled that, in light of the parties' adversary relationship, Petitioners

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[4] The district court's ruling on this point disregarded a fundamental principle of American contract law, for "all jurisdictions recognize fraud as grounds for setting aside a release." *Gess v. United States*, 909 F. Supp. 1426, 1447 (M.D. Ala. 1995) (citing *Dice v. Akron, Canton & Youngstown R. Co.*, 342 U.S. 359 (1952)).

could not establish reasonable reliance as a matter of law. Petitioners' claim for breach of fiduciary duty was dismissed without prejudice on jurisdictional grounds.

C. The Court of Appeals' Decision

The Court of Appeals affirmed each of the district court's rulings, but on slightly different grounds. The Eleventh Circuit first held that, under controlling circuit precedent, the validity of the general release as a defense to Petitioners' claims, both federal and state, was a matter governed by Florida law. 166 F.3d at 1117 (App. 5a). The Court of Appeals, unlike the district court, acknowledged the established principle that a fraudulently procured release is voidable by the defrauded party. *Id.* (App. 6a) However, like the district court, the Court of Appeals measured Petitioners' federal securities claims against rules of Florida common law, and, like the district court, it found Petitioners' claims to be precluded by those rules.

Aside from arguing for the application of federal law, Petitioners presented two principal arguments to the Court of Appeals. First, Petitioners challenged the district court's view that their reliance on Respondents' written representation that there were no plans to sell the company was unreasonable as a matter of law. Petitioners urged the Court of Appeals to recognize that a party to a securities transaction *must* be permitted to rely on an express, written representation that is recited in an agreement memorializing the transaction. The Court of Appeals agreed with that general principle, describing Petitioners' argument as "plainly correct," 166 F.3d at

1118 (App. 8a), but held that such reliance is permitted "only to the extent that [Petitioners] have a right to rely on an express term when pursuing a contract cause of action." *Id.* The only authority cited by the court for that proposition, *Pettinelli v. Danzig*, 722 F.2d 706 (11th Cir. 1984), does not support it.[5] By applying state-law principles to Petitioners' federal claims, the Court of Appeals appears to have exempted Rule 10b-5 defendants from liability whenever the defendant's "untrue statement of a material fact" is contained in a written contract.

Second, Petitioners argued that, with respect to Respondents' failure to disclose their artificial suppression of the company's cash flow, Petitioners were entitled to a presumption of reasonable reliance under *Affiliated Ute Citizens of Utah v. United States*, 406 U.S. 128 (1972). The Court of Appeals dismissed *Affiliated Ute* as merely a "federal securities fraud case" and noted that there was no comparable precedent in Florida common law. 166 F.2d at 1119 (App. 9a). Thus, under the Eleventh Circuit's ruling, Petitioners have been deprived of a *federal* securities claim because the Florida Supreme Court, unlike this Court, has not determined whether reasonable reliance is presumed in omission cases.

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[5] *Pettinelli* was a case dealing with *oral* misrepresentations that preceded, and were not preserved in, the parties' written agreement. *See Pettinelli*, 722 F.2d at 709-10 (the plaintiffs were relying solely on representations "not embodied in the Release," and were precluded from proving such representations by a provision in the agreement stating that the written agreement contained the parties' entire understanding).

REASONS FOR GRANTING THE WRIT

The Eleventh Circuit's ruling conflicts with this Court's own precedents and with well-reasoned decisions of the Second, Sixth and Ninth Circuits. Under those decisions, the conditions under which a release is effective to bar a party's federal securities claim is an issue of *federal*, not state, law. The Eleventh Circuit's view that such issues are governed by state law is idiosyncratic and unwise. If allowed to stand, the Court of Appeals' ruling means that federal securities plaintiffs in Florida will be subject to different legal rules – and potentially different outcomes – than federal securities plaintiffs in other Circuits. More significantly, the Eleventh Circuit's ruling means that federal securities plaintiffs in Florida will be subject to different legal rules than those in Alabama or Georgia.

If the Court grants certiorari and agrees with us that the issues decided below are matters of federal law, it should remand to the Court of Appeals to allow that court to consider and decide those issues under a uniform federal law.

I. THE ELEVENTH CIRCUIT'S OPINION DISREGARDS CONTROLLING PRECEDENT OF THIS COURT AND CREATES A CONFLICT WITH THREE OTHER CIRCUITS

The elements of a federal statutory claim, the affirmative defenses to such a claim, and the matters that may be proven in avoidance of such affirmative defenses are all issues governed by federal, rather than state, law. *See Town of Newton v. Rumery*, 480 U.S. 386, 392 (1987)

(enforceability of agreement purporting to release a section 1983 claim is an issue of federal law); *Burks v. Lasker*, 441 U.S. 471, 477 (1979) ("Legal rules which impact significantly upon the effectuation of federal rights must . . . be treated as raising federal questions"). It follows from that legal truism that the conditions under which a release is effective to bar a party's federal securities claim must be treated as an issue of federal, rather than state, law.[6]

Although this Court has not ruled on the precise issue decided by the Court of Appeals, the Court's prior cases leave no doubt as to its proper resolution. In 1952, this Court determined that the legal effect of a release of claims under the Federal Employer's Liability Act is a matter of federal law. *Dice v. Akron, Canton & Youngstown R. Co.*, 342 U.S. 359 (1952). The Court's reasoning in that case is fully applicable here:

> We . . . hold that validity of releases under the Federal Employers' Liability Act raises a federal question to be determined by federal rather than state law. Congress in § 1 of the Act granted petitioner a right to recover against his employer for damages negligently inflicted. State laws are not controlling in determining what the incidents of this federal right shall be.

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[6] The choice of law undoubtedly makes a difference. The substantive legal rule adopted by courts that treat the issue as one of federal law reflects the paramount federal interest in protecting investors against fraud. *See, e.g., Burgess v. Premier Corp.*, 727 F.2d 826, 831 (9th Cir. 1984) ("A release is valid for purposes of federal securities claims only if the [releasing parties] had 'actual knowledge' that such claims existed") (quoting *Royal Air Properties, Inc. v. Smith*, 333 F.2d 568 (9th Cir. 1964)).

> Manifestly the federal rights affording relief to injured railroad employees under a federally declared standard could be defeated if states were permitted to have the final say as to what defenses could and could not be properly interposed to suits under the Act. Moreover, only if federal law controls can the federal Act be given that uniform application throughout the country essential to effectuate its purposes. Releases and other devices designed to liquidate or defeat injured employees' claims play an important part in the federal Act's administration. Their validity is but one of the many interrelated questions that must constantly be determined in these cases according to a uniform federal law.

Id. at 361-62 (citations omitted).

Dice stands for the principle that "federal law always governs the validity of releases of federal causes of action." *Mardan Corp. v. C.G.C. Music, Ltd.*, 804 F.2d 1454, 1457 (9th Cir. 1986). This Court's reasoning in *Dice* has been followed in countless decisions involving federal laws other than FELA, including several such decisions by the Eleventh Circuit.[7] Most significantly here, *Dice* has

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[7] *See, e.g., United States v. Northrop Corp.*, 59 F.3d 953, 960 (9th Cir. 1995) ("It is well established that federal common law properly is invoked to determine the validity of a release of a statutorily-conferred federal right") (False Claims Act claim); *Williams v. Phillips Petroleum Co.*, 23 F.3d 930, 935 (5th Cir. 1994) (federal law determines validity of release of claims under federal Worker Adjustment and Retraining Notification Act); *U.S. Anchor Mfg., Inc. v. Rule Indus., Inc.*, 7 F.3d 986, 993 n.11 (11th Cir. 1993) (federal antitrust claims); *Snider v. Circle K Corp.*, 923 F.2d 1404, 1407 (10th Cir. 1991) (Title VII claims); *O'Hare v. Global Natural Resources, Inc.*, 898 F.2d 1015, 1017 (5th Cir. 1990)

been applied by three circuit courts of appeal in cases arising under the federal securities laws.

In *Petro-Ventures, Inc. v. Takessian*, 967 F.2d 1337 (9th Cir. 1992), the Ninth Circuit applied federal law to determine "the validity of a release of all unknown claims in the context of a settlement of ongoing litigation, where potential violations of federal securities laws are later discovered." *Id.* at 1338. Reasoning that "[a]n action involving securities is no different" than an action arising in any other area, the court applied established law: "Where a settlement agreement calls for the application of state law, but where violations of both federal and state securities law are alleged, '[i]t is well established that federal law governs all questions relating to the validity of and defenses to purported releases of federal statutory causes of action.' " *Id.* at 1340 (quoting *Locafrance*, 558 F.2d at 1115). The court noted that "[a]nother circuit" had applied state law in the same context, but had done so without analysis of the issue and without considering the applicability of federal law. 967 F.2d at 1340 n.4 (citing *Pettinelli* and *Finn*).[8]

(Age Discrimination in Employment Act claims); *Stroman v. West Coast Grocery Co.*, 884 F.2d 458, 461 (9th Cir. 1989) (Title VII claims); *Eatmon v. Bristol Steel & Iron Works, Inc.*, 769 F.2d 1503, 1516-17 (11th Cir. 1985) (same); *Parker v. DeKalb Chrysler Plymouth*, 673 F.2d 1178, 1180 (11th Cir. 1982) (Truth in Lending Act claims); *Harless v. Research Institute of America*, 1 F. Supp.2d 235, 241 (S.D.N.Y. 1998) (ERISA claims).

[8] There is a typographical error in footnote 4 of *Petro-Ventures*: the court states that federal law was applied in *Finn*, whereas the Eleventh Circuit in fact applied Florida law.

In *Street v. J.C. Bradford & Co.*, 886 F.2d 1472, 1481 (6th Cir. 1989), the Sixth Circuit likewise applied federal law to determine the effectiveness of a release in an action involving RICO, commodities and securities claims. Citing a district court decision which in turn relied on *Dice* and *Locafrance*, *Griswold v. E.F. Hutton & Co., Inc.*, 622 F. Supp. 1397, 1404 (N.D. Ill. 1985), the Court of Appeals held that "[f]ederal law controls the validity of a release of a federal cause of action." *Id.*

Finally, in *Locafrance U.S. Corp. v. Intermodal Sys. Leasing, Inc.*, 558 F.2d 1113, 1115 & n.3 (2d Cir. 1977), the Second Circuit, citing *Dice*, applied federal law to determine the legal effect of a general release of federal securities claims, notwithstanding a choice-of-law provision in the parties' settlement agreement calling for the application of New York law. Having chosen to apply federal law, the Second Circuit reversed a summary judgment in favor of defendants who were not parties to the release. The Court of Appeal noted that, while the rule that a release of one joint tortfeasor is a release of all was the prevailing rule under New York law, it was "plainly not the rule" under federal law and hence not the rule applicable to the plaintiffs' federal securities claims.

II. THE POLICIES UNDERLYING THE FEDERAL SECURITIES LAWS REQUIRE A UNIFORM FEDERAL RULE RATHER THAN INCORPORATION OF STATE-LAW RULES

The Eleventh Circuit plainly erred in believing that whether Petitioners' general release is a valid defense to Petitioners' federal claims was to be determined by state

rather than federal law. However, the fact that federal law applies does not necessarily mean that a uniform federal rule is required; federal law is sometimes made by incorporating state law. *See, e.g., United States v. Kimbell Foods, Inc.*, 440 U.S. 715, 728 (1979). The Court of Appeals' error would be of little practical import if this were a case in which incorporation of state-law rules is appropriate. It is not such a case.

Under this Court's decision in *Kimbell Foods*, the need for a uniform federal rule is determined by applying a three-part test: (1) whether the matter requires "a nationally uniform body of law"; (2) whether incorporation of state law would frustrate specific federal objectives; and (3) whether application of a federal rule "would disrupt commercial relationships predicated on state law." *Kimbell Foods*, 440 U.S. at 728-29. If either the first or second condition is satisfied, a uniform federal rule is required. *Id.* at 728.

In this case, both the first and second conditions are satisfied, making it unnecessary to consider the third. First, a uniform federal rule is desirable. In *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350 (1991), this Court specifically recognized the need for uniform federal rules rather than borrowed state-law rules in actions arising under Rule 10b-5. The Court in that case overruled hundreds of lower-court cases that had borrowed state-law limitations periods and adopted a single, uniform federal limitations period applicable to Rule 10b-5 claims. The Court's reasoning in *Lampf* was based in part on the "multistate nature" of federal securities claims, and the potential for forum-shopping and complex choice-of-law litigation if state limitations

periods were incorporated. *Id.* at 357 (quoting *Agency Holding Corp. v. Malley-Duff & Assoc., Inc.*, 483 U.S. 143, 154 (1987)). Moreover, *Dice* itself recognized the need for uniform federal standards in determining the validity of releases raised as a defense to claims arising under federal law. 342 U.S. at 361. *See also Town of Newton v. Rumery*, 480 U.S. at 392 (creating a uniform federal rule to govern the validity of waivers of section 1983 claims). *Lampf, Dice* and *Rumery* strongly counsel adoption of a uniform federal rule in this case.[9]

Second, because a valid release has the effect of extinguishing the plaintiff's claim, allowing state-law rules to determine a release's validity would create a substantial risk that such rules will impinge on federal interests.[10] Again, *Dice* holds as much. It is true in cases arising under the 1934 Securities Exchange Act, just as it is in cases arising under FELA, that "the federal rights affording relief to [defrauded investors] under a federally declared standard could be defeated if states were permitted to have the final say as to what defenses could and could not be properly interposed to suits under the Act."

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[9] In addition, as the Ninth Circuit opined in *United States v. Northrop Corp.*, 59 F.3d 953 (1995), uniformity of rules "is necessary to prevent parties, through use of choice-of-law clauses, from selecting as governing law the law of a state that is most likely to uphold the release." *Id.* at 961 (citing *Petro-Ventures*, 967 F.2d at 1340).

[10] *See Northrop Corp.*, 59 F.3d at 961 (in cases involving federal causes of action, there is a "distinct possibility that state law would overemphasize . . . the interest favoring 'ironclad and enforceable general releases' ") (quoting *Winet v. Price*, 4 Cal. App. 4th 1159, 1173, 6 Cal. Rptr. 2d 554 (1992)).

Dice, 342 U.S. at 361. Thus, in Rule 10b-5 cases, as in FELA cases, the validity of releases "is but one of the many interrelated questions" that must be determined "according to a uniform federal law." *Id.* at 362.

The circumstances of this case illustrate both the need for uniformity and the danger that state-law rules governing releases will impinge on federal interests. The facts on which Petitioners relied to defeat the general release are the very same facts underlying their affirmative claims for relief under Rule 10b-5. In cases of this sort, determining whether Petitioners can successfully prove fraud and thereby avoid Respondents' affirmative defense involves precisely the same issues of falsehood, materiality and reliance that are involved in determining whether Petitioners can successfully prove securities fraud and thereby obtain the remedies provided by federal law. By using state-law rules to assess the validity of the release – such as the rule that a party has a right to rely on an express contractual representation "only . . . when pursuing a contract cause of action" – the court will necessarily decide the very issues that are at the heart of the plaintiff's federal claims, as the lower courts did here. Such issues should be decided under uniform federal rules that take into account the interests protected by the relevant federal law.

CONCLUSION

The Court of Appeals erred in determining the validity of Petitioners' general release under Florida law rather than a uniform federal law. For the reasons stated above, Petitioners respectfully contend that their petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX A

Ann A. MERGENS, individually, and as Trustee for the Ann A. Mergens Revocable Trust; et al., Plaintiffs-Appellants, Cross-Appellees,

v.

Alex W. DREYFOOS, Jr; Photo Electronics Corporation, a Florida corporation; et al., Defendants-Appellees, Cross-Appellants.

No. 97-5412.

United States Court of Appeals,
Eleventh Circuit.

Feb. 3, 1999.

Gerald F. Richman, Gary Steven Betensky, Kenneth L. Dobkin, Richman, Greer, Weil, Brumbaugh, Mirabito & Christensen, West Palm Beach, FL, Michael Nachwalter, Harry Richard Schafer, Scott E. Perwin, Kevin J. Murray, Kenny, Nachwalter, Seymour, Arnold, Critchlow & Spector, Miami, FL, for Plaintiffs-Appellants, Cross-Appellees.

Robert M. Montgomery, Jr., Montgomery & Larmoyeux, James Wallace Beasley, Jr., David Leacock, Beasley, Leacock & Hauser, West Palm Beach, FL, for Defendants-Appellees, Cross-Appellants.

Appeal from the United States District Court for the Southern District of Florida.

Before ANDERSON and DUBINA, Circuit Judges, and FAY, Senior Circuit Judge.

FAY, Senior Circuit Judge:

Plaintiffs-Appellants Ann Mergens, individually, and as Trustee for the Ann M. Mergens Revocable Trust, Mary

Mergens Loughran, and Paul Mergens ("Mergenses") appeal the district court's order granting the Defendants-Appellees Alex W. Dreyfoos, Jr., Photo Electronics Corporation, Carolyn B. Dreyfoos, D.E. Murray, Photo Electronics Company, L.P., and Freedom Communications, Inc. ("Dreyfoos") motion for judgment on the pleadings. Based on a thorough review of the pleadings, briefs and record, we conclude that the Mergens federal securities fraud and common law fraud claims are barred by the general release and merger clause. Similarly, the district court did not abuse its discretion in declining to exercise supplemental jurisdiction over Plaintiffs-Appellants' remaining common law breach of fiduciary duty claim and dismissing it without prejudice. Accordingly, we affirm.

FACTS

These claims arose out of the negotiation and execution of a Stock Repurchase Agreement ("Agreement") for the sale of the Mergenses' 38% minority equity interest in Photo Electronics Corporation ("PEC") to Dreyfoos, PEC's majority stockholder. On January 17, 1994, the parties entered into this Agreement whereby the Mergenses received $3 million in cash and a $11.5 million promissory note to be paid in eight years. The Agreement contained a merger clause and a general release applicable to all claims accrued as of the date of the Agreement. On September 28, 1995, the day after Dreyfoos paid the note in full, the Mergenses learned that PEC had sold its main asset, WPEC-TV, to Freedom Communications for $150-160 million. Believing that Dreyfoos had realized a

windfall, the Mergenses sought to rescind the Agreement but Dreyfoos refused.

The Mergenses brought this action in the United States District Court for the Southern District of Florida in December, 1995, alleging in Counts I-III federal securities fraud in violation of both Section 10(b) of the Securities and Exchange Act of 1934, 15 U.S.C. § 78j, and Rule 10b-5, 17 C.F.R. § 240.10b-5; alleging in Count IV common law fraud in the inducement; and alleging in Count V common law breach of fiduciary duty. Specifically, the Mergenses alleged that Dreyfoos and PEC misrepresented the cash flow and other assets of PEC in order to induce them to sell at a price far below market value. The Mergenses further alleged Dreyfoos fraudulently represented in the Agreement itself that PEC did not contemplate the sale of its assets. On July 18, 1997, the court granted Defendants-Appellees motion for summary judgment on the pleadings with respect to the federal securities fraud and the common law fraud claims and dismissed the fiduciary duty claim without prejudice for want of federal subject matter jurisdiction. 28 U.S.C. § 1367(c)(3). The court held that the Agreement's merger clause and general release barred any securities fraud claim based on misrepresentations or omissions not preserved in the Agreement itself; that a misrepresentation contained in the Agreement only gave rise to a breach of contract claim; and that the rule of unjustifiable reliance barred the fraud in the inducement claim.

On appeal, the Mergenses argue that the merger clause and general release do not bar federal securities law and common law fraud claims where a misrepresentation is expressly set forth in the written agreement.

Second, the Mergenses contend that neither the Agreement's terms nor the rule of unjustifiable reliance bar fraud claims based on representations made to third parties or omissions. Third, the Mergenses argue as Cross-Appellees that the court was not required to dismiss the fiduciary duty claim which it dismissed without prejudice.

In response, Dreyfoos argues that the general release and rule of justifiable reliance bar all claims. Dreyfoos also argues, as Defendants-Cross-Appellees, that the district court erred by failing to dismiss the breach of fiduciary duty claim with prejudice.

STANDARD OF REVIEW

This Court reviews judgments on the pleadings *de novo*. *See Ortega v. Christian*, 85 F.3d 1521, 1524-25 (11th Cir.1996). Judgment on the pleadings is appropriate where no issue of material fact remains unresolved and the moving party is entitled to judgment as a matter of law. *Id.* at 1524. When reviewing judgment on the pleadings, we must take the facts alleged in the complaint as true and view them in the light most favorable to the nonmoving party. *Id.* at 1524.

In contrast, review of the district court's dismissal of the state cause of action for want of subject matter jurisdiction is reviewed under the abuse of discretion standard. *See L.A. Draper & Son v. Wheelabrator-Frye, Inc.*, 735 F.2d 414, 420 (11th Cir.1984).

DISCUSSION

The first issue is whether the release in the written Agreement bars the Mergenses' federal securities and common law fraud claims. As set forth in the Agreement, Plaintiffs-Appellants contracted to release Defendants-Appellees from any claim they "ever had, now have . . . shall or may have . . . from the beginning of the world to the date [of the Settlement Agreement]." The parties also stipulated, pursuant to Art. V.8 of the Agreement, that Florida law will govern in the event of a dispute.[1]

Under Florida law, "[t]he validity and effect of a settlement and release are governed by contract law." *Travelers Insurance Co. v. Horton*, 366 So.2d 1204 (Fla. 3rd DCA 1979). "A party is bound by, and a court is powerless to rewrite, the clear and unambiguous terms of a voluntary contract." *Medical Center Health Plan v. Brick*, 572 So.2d 548, 551 (Fla. 1st DCA 1990).

The Agreement contains four relevant provisions. First, the Mergenses warranted that they were sophisticated sellers and that they were provided with the full opportunity to investigate and evaluate the financial condition of PEC. Second, Dreyfoos warranted that he had no current intention or plan to sell PEC or PEC's assets. Third, the Mergenes agreed to release Dreyfoos from any

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[1] Although the Mergenes urge this Court to ignore the plain wording of the contract and apply federal common law to this action, case law in this circuit does not allow us to do so. *See, Finn v. Prudential-Bache Securities, Inc.*, 821 F.2d 581, 586 n. 5 (11th Cir.1987) (applying state law to determine the validity of release of federal securities law claims); *Pettinelli v. Danzig*, 722 F.2d 706, 709 (11th Cir.1984).

and all causes of action from the beginning of time to the date the agreement was signed. Finally, the parties agreed that Agreement represented the entire understanding of the parties and that any prior representation was superseded by the current contract.

The district court was correct in holding that the general release unambiguously bars all actions premised on claims that arose before, and contemporaneous to, the execution of the Agreement. The only question remaining is whether the Mergenses can establish that the release was procured by fraud, thereby making it voidable.

The Mergenses contend that their fraud causes of action survive the release because Dreyfoos fraudulently misrepresented in the Agreement that he had no current intention to sell PEC or any of its assets. To prove fraud under Florida law, the plaintiff must show that "1) the defendant made a false representation of past or present fact, 2) the defendant knew the statement was false, 3) the statement was made for the purpose of inducing the plaintiff to rely on it, and 4) the plaintiff's reliance was reasonable." *Finn v. Prudential-Bache Securities, Inc.*, 821 F.2d 581, 586 (11th Cir.1987) (citing *Pettinelli v. Danzig*, 722 F.2d 706, 709 (11th Cir.1984)).

The district court relied on *Pettinelli*, 722 F.2d at 706, in holding that the Mergenses were not justified in relying on any representation for purposes of establishing a fraud claim. In *Pettinelli* this Court addressed a claim brought by the plaintiff alleging the defendant fraudulently induced him to execute a contract concerning the sale of securities. This Court held that no fraud cause of action existed because the plaintiff was unable to show a

material misrepresentation, and even assuming a material misrepresentation existed, reliance on that representation was unjustifiable as a matter of law. With respect to the rule of justifiable reliance, this Court said "[w]hen negotiating or attempting to compromise an existing controversy over fraud and dishonesty it is unreasonable to rely on representations made by the allegedly dishonest parties." *Id.* at 710.

Prior to the execution of the Agreement in the instant case, the Mergenses complained Dreyfoos was mismanaging PEC alleging "a shocking waste of corporate assets and personal profit at the expense of PEC shareholders by Dreyfoos." The attorney for the Mergenses sent a letter to Dreyfoos threatening litigation if Dreyfoos did not buy back the Mergens's share of PEC. The letter included a prepared, but not filed, complaint alleging fraud and other causes of action. A more untrusting relationship is difficult to imagine.

Moreover, in factual situations substantially similar to this action, this Circuit and various district courts have held that the plaintiffs were unjustified in relying on representations made by the defendants. *See Finn v. Prudential-Bache Securities Inc.*, 821 F.2d 581, 585-586 (11th Cir.1987); *Hall v. Burger King Corp.*, 912 F.Supp. 1509, 1524-25 (S.D.Fla.1995); *Jankovich v. Bowen*, 844 F.Supp. 743, 747-48 (S.D.Fla.1994); *Zelman v. Cook*, 616 F.Supp. 1121, 1133 (S.D.Fla.1985). First, the Plaintiffs-Appellants specified in the agreement that they were sophisticated sellers, represented by both legal counsel and certified public accountants. Second, the parties had been in an adversarial relationship since well before the execution of the Agreement. Finally, the Mergenses entered into the

Agreement, in part, to settle a lawsuit threatened by the Plaintiff-Appellants that claimed fraud. Based on the posture of the parties prior to the execution of the Agreement, the district court correctly held that the Mergenses had no legal right to rely on the representations of Dreyfoos and PEC.

The Mergenses contend, notwithstanding *Pettinelli* and its progeny, that they were justified in relying on representations set forth in the written agreement, no matter how adversarial the relationship might be. This argument is plainly correct, but only to the extent that they have a right to rely on an express term when pursuing a contract cause of action. As the court explained in *Pettinelli*, where a written agreement explicitly contains representations, and those representations have not been performed, a breach of contract action may be appropriate. *Id.* at 710. As the Mergenses have not plead breach of contract, no cause of action is available based on such a theory.[2]

The Mergenses also contend that they justifiably relied on misrepresentations made to "neutral" third parties, i.e., parties with whom the Defendant-Appellees were not in an adversarial relationship, and that these misrepresentations can form the basis of their fraud claims. We do not agree.

The Mergenses had no right to rely on any representation presented by Dreyfoos to a third party concerning

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[2] We offer no opinion as to the merits of such a claim. We only note that when express terms in a contract are breached the appropriate action is for breach of contract.

facts relevant to the sale of their stock. The Plaintiffs-Appellants' Amended Complaint expressly states that on June 23, 1993 PEC's chief financial officer commissioned Merrill Lynch to value the Mergenses' interest in PEC as an inducement to sell. At that point in time, the Mergenses had already threatened a shareholder's action, discovered a shocking waste of corporate assets, and commissioned a valuation of their interest in PEC with independent accountants. These facts show that the parties were clearly adversaries when the reliance on PEC's alleged misrepresentations to Merrill Lynch occurred. Furthermore, as PEC intended the Merrill Lynch report to induce the Mergenses to sell, it was just as unreasonable for the Mergenses to assume that PEC made a full and accurate disclosure in negotiating their Agreement. Finally, the Merrill Lynch report contained an explicit disclaimer stating that the findings were based only on information provided by PEC, that it did not independently verify such information, and that it assumed such information to be accurate. Given the strong disclaimer, the nature of the parties relationship at that time, and the knowledge that the report was created to induce a sale, this Court affirms the district court's holding that reliance on such misrepresentation was unjustifiable as a matter of law.

Finally, the Mergenses contend that they were justified in relying on Defendant-Appellee's omissions. To support this argument, the Mergenses cite a federal securities fraud case where the plaintiffs were not required to prove reliance on omissions. *See Affiliated Ute Citizens of Utah v. United States*, 406 U.S. 128, 153, 92 S.Ct. 1456, 31 L.Ed.2d 741 (1972). In *Affiliated*, the Supreme Court held

that it was sufficient for plaintiffs to prove the facts withheld were material to the investment decision. *Id.* at 153-154, 92 S.Ct. 1456. However, the Mergenses point to no authority that has applied this exception to the rule of justifiable reliance to a common law fraud in the inducement claim.

Although the Plaintiffs-Appellants contend *Pettinelli* is not applicable because the facts in that case concerned misrepresentations, not omissions, we find the opinion persuasive nonetheless. As misrepresentations can so easily be characterized as omissions,[3] an exception for omissions would virtually eliminate the *Pettinelli* rule altogether. Given this Circuit's and district courts' reliance on *Pettinelli, see supra,* we conclude that the district court correctly dismissed the Mergenses' fraud in the inducement claim.

Lastly, the Defendants-Cross-Appellants contend that the district court abused its discretion by dismissing the Mergenses' state common law fiduciary claim without prejudice. Dreyfoos argues that as the Agreement's general release equally bars this claim the district court should have exercised supplemental jurisdiction and dismissed the claim with prejudice.

The district court did not abuse its discretion in declining to exercise supplemental jurisdiction over

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[3] An example of re-characterizing a misrepresentation as an omission came at a hearing before the district court where counsel for the Mergenses stated, "I will give you some of the omissions in our case. The defendants in our case omitted to tell us that the projections they had given us as to how this business was going and how it would do in the future were false."

Plaintiffs-Appellants' fiduciary duty claim. Discretion over pendant state claims is expressly conferred to district courts by statute. 28 U.S.C. § 1367(c) provides that a district court may decline to exercise supplemental jurisdiction if "the district court has dismissed all claims over which it has original jurisdiction." More specifically, this Court has noted that "if the federal claims are dismissed prior to trial, Gibbs strongly encourages or even requires dismissal of state claims." *L.A. Draper & Son v. Wheelabrator-Frye, Inc.*, 735 F.2d 414, 428 (11th Cir.1984) (citing *United Mine Workers v. Gibbs*, 383 U.S. 715, 726, 86 S.Ct. 1130, 16 L.Ed.2d 218 (1966)).

In the instant case, the district court granted Defendant-Appellees' motion for judgment on the pleadings with respect to all claims over which the court had original jurisdiction. As all of the federal claims were dismissed before trial, the district court appropriately declined to exercise supplemental jurisdiction over Plaintiffs-Appellants' remaining state claim. This Court now holds that the district court did not abuse its discretion in dismissing Count V without prejudice.

AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 95-8793-CIV-RYSKAMP

ANN A. MERGENS, individually, and as Trustee for the Ann A. Mergens Revocable Trust, MARY MERGENS LOUGHRAN and PAUL MERGENS,

Plaintiffs,

vs.

ALEX W. DREYFOOS, JR., PHOTO ELECTRONICS CORPORATION, a Florida corporation, CAROLYN B. DREYFOOS, D.E. "JOSH" MURRAY, and PHOTO ELECTRONICS COMPANY, L.P., a Delaware limited partnership,

Defendants.
_____/

ORDER GRANTING, IN PART, AND DENYING, IN PART, THE DEFENDANTS' MOTION FOR JUDGMENT ON THE PLEADINGS

(Filed July 18, 1997)

THIS CAUSE came before the Court upon the Defendants' Motion for Judgment on the Pleadings [DE-76]. On Thursday, June 12, 1997, the Court held a hearing on the Motion at which time all the Parties had an opportunity to address the Court. Thereafter, the Court gave the Parties fifteen days to file supplemental briefs. These briefs have now been filed, and this matter has been thoroughly and expertly briefed. This Motion is now ripe for adjudication.

I. BACKGROUND

In 1963, Paul Mergens and Alex Dreyfoos, inventors of certain video technology not relevant to this cause of action, founded Photo Electronics Corporation ("PEC"). *Amended Complaint* ¶¶ 11-12. In 1968, Mergens and Dreyfoos moved their business to Palm Beach County, and over time acquired several subsidiaries including PEC Communications, Inc. ("WPEC-TV"), LaserColor Corporation ("LaserColor"), and the Sailfish Marina ("the Marina"). *Id.* Mergens owned 38% of PEC and Dreyfoos owned the remaining 62%. *Id.* This apparently happy partnership ended in 1986 when Mergens was hit and killed while riding his bicycle. *Id.* Paul Mergens's wife, Ann A. Mergens, and his- children, Mary Mergens Loughran and Paul Mergens, (together "the Mergenses") inherited his 38% share of PEC. *Id.*

The Mergenses allege that after they rebuffed Dreyfoos in his effort to buy their 38% share, Dreyfoos proceeded "[to] operat[e] PEC as if it were entirely his own company . . . to quench his expensive thirst for material possessions" and "to force the Mergenses to transfer to him their interest in PEC." *Id.* ¶¶ 13-14. As a minority shareholder in PEC, Ann Mergens had little or no control over how Dreyfoos ran PEC, and she claims that her attempts to elicit explanations were met with "the obfuscation of smoke and mirror tactics," including the representation that PEC "had fallen on difficult times." *Id.* ¶ 15. After a year of "hounding" Dreyfoos for information, Ann Mergens threatened a shareholders action for access to corporate information. *Id.* ¶¶ 16-17. In response, Dreyfoos provided the Mergenses with PEC

records (which the Mergenses now maintain were incomplete) that allegedly revealed "a shocking waste of corporate assets and personal profit at the expense of PEC shareholders by Dreyfoos." *Id.* ¶ 17.

On January 3, 1994, Ann Mergens's lawyer, Jeffrey Stoops, mailed a letter to Alex Dreyfoos's lawyer, Harrison K. Chauncey, Jr., threatening litigation of Dreyfoos did not buy back Mergens's shares of PEC. *Id.* ¶ 18. The letter included a complaint already prepared by Stoops (but not filed) alleging fraud and certain other causes of action against Dreyfoos and PEC. *Id.* This threat of litigation regarding allegations of fraud had its desired effect, and on January 17, 1994, the Mergenses, Dreyfoos and PEC entered into a Stock Repurchase Agreement ("the Agreement") whereby the Mergenses received $3 million in cash, and a promissory note ("the Note") worth $11.5 million in return for their stock in PEC. *Id.* ¶¶ 20-21. The Agreement contained releases and representations, the effect of which are now at issue and which are fully discussed *infra*. The Note was to be paid up over eight years, but was paid in full by PEC on September 27, 1995. *Id.* ¶¶ 27-29. On September 28, 1995, the Mergenses allegedly learned that PEC had sold its main asset WPEC-TV to Freedom Communications for what the Mergenses estimate to be $150-160 million. *Id.* ¶ 29. On October 23, 1995, the Mergenses sought to rescind the Agreement, an offer that the Defendants refused. *Id.* ¶¶ 32-33.

On December 28, 1995, the Mergenses brought this action in federal court alleging in Counts I, II and III of their Amended Complaint (under which they are now traveling) federal securities fraud in violation both of Section 10(b) of the Securities and Exchange Act of 1934

("the 1934 Act"), 15 U.S.C. § 78j, and of Rule 10b-5 promulgated thereunder, 17 C.F.R. § 240.10b-5, alleging in Count IV common law fraud in the inducement, and alleging in Count V common law breach of fiduciary duty. Specifically, the Mergenses allege that PEC and Dreyfoos artificially depressed "the cash flow position" and "the cash flow projections" of PEC and its subsidiaries in order to hide the true value of PEC.[1] *Id.* ¶¶ 38-55. The Mergenses also allege that they and their advisors in the stock repurchase transaction justifiably relied on the cash flow figures in appraising the value of PEC, that Dreyfoos and PEC knew that the cash flow numbers were false and misleading, and that Dreyfoos and PEC intended that the Mergens would rely on the numbers in appraising the value of PEC. *Id.* Finally, the Mergenses allege that the Dreyfoos and PEC fraudulently represented in the Stock Repurchase Agreements that they did

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[1] The Mergenses also allege fraud against D.E. "Josh" Murray, the Vice-president, Chief Operating Officer and Treasurer of PEC, and Carolyn B. Dreyfoos, the wife of Alex Dreyfoos, *Amended Complaint* ¶¶ 4 and 53(a). These claims against Carolyn Dreyfoos and Murray are discussed at fn. 7, *infra*.

The Mergenses joined Photo Electronics Company, L.P., as "a necessary and indispensable party." *Id.* ¶ 56. Under Fed.R.Civ.P. 19(a), a party may join a person if "in the person's absence complete relief cannot be accorded among those already parties. . . . " The Mergenses joined Photo Electronics Company, L.P. on the grounds that it now owns the operating license for WPEC-TV once owned by PEC. *Id.* The Mergenses, however, have not alleged any fraud against Photo Electronics Company, L.P., and therefore any claims against it succeed or fail on the basis of the Mergenses's claims against Dreyfoos and PEC.

not contemplate the sale of PEC or any of its assets, including WPEC-TV. *Id.*

The Defendants timely moved to dismiss, and on February 7, 1997, the Court denied the motion. The Defendants then filed their answer to the Complaint raising the affirmative defense that the Plaintiffs's claims were barred by the terms of the release contained in the Agreement. On April 30, 1997, the pleadings closed, and the Defendants have now moved for judgment on the pleadings.

The Court has jurisdiction over this matter pursuant to 15 U.S.C. § 78aa, 28 U.S.C. § 1331, and 28 U.S.C. § 1367(a).

II. DISCUSSION

A. Standard of Review

"After the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings." Fed.R.Civ.P. 12(c). "Judgment on the pleadings is proper when no issues of material fact exist, and the movant is entitled to judgment as a matter of law." *Oretega v. Christian*, 85 F.3d 1521, 1524 (11th Cir. 1996), *citing* Fed.R.Civ.P. 12(c). The Court must "accept the facts in the complaint as true and view them in the light most favorable to the nonmoving party." *Id.* (citations omitted).

B. The Federal Claims: Section 10(b) and Rule 10(b)(5)

Counts I, II and III, which form the basis of this Court's jurisdiction in this matter, are premised on section 10(b) of the Securities and Exchange of Act of 1934 which makes it "unlawful for any person . . . to use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the [Securities and Exchange] Commissioner may prescribe. . . . " 15 U.S.C. § 78j. Rule 10b-5, promulgated by the Securities and Exchange Commission ("the SEC"), makes it unlawful for any person:

> (a) To employ any device, scheme or artifice to defraud,
>
> (b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstance under which they were made, not misleading, or
>
> (c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security.

17 CFR § 240.10b-5 (indentations omitted). The Parties do not dispute that their transaction falls under the authority of the 1934 Act and the Rules promulgated thereunder.

To make out a successful claim under § 10(b) and Rule 10b-5 for misrepresentation, the Plaintiffs must be able to show: "(1) false representation of a material fact

(2) made with scienter (3) upon which the plaintiff justifiably relied (4) that proximately caused the plaintiff's damages." *Diamond v. Lamotte,* 709 F.2d 1419, 1422-1423 (11th Cir. 1983) (citations omitted). In moving for judgment on the pleadings, the Defendants maintain that, taking all the Plaintiffs' allegations as true and in a light most favorable to them, the Plaintiffs' claim of federal securities fraud is barred by the release contained in the Agreement of Mergenses entered into with Dreyfoos and PEC, and that any claim of fraud in the inducement in executing that release is barred by the rule of unjustifiable reliance promulgated in *Pettinelli v. Danzig,* 722 F.2d 706 (11th Cir. 1984).

C. The Release

The first question the Court must address is whether the release contained in the Agreement the Mergenses entered into with Dreyfoos and PEC bars their federal securities fraud claims.[2] Pursuant to Art. V.8 of the Agreement, Florida law governs, and under Florida law:

> The construction and enforcement of a release are governed by general principles of contract law. A review of Florida Law reveals that a general release will ordinarily be regarded as embracing all claims which have matured at the time of its execution.

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[2] "[N]o federal policy . . . prohibit[s] extra-judicial resolution of securities fraud claims." *Driscoll v. Schuttler,* 697 F.Supp. 1195, 1203 (N.D.Ga. 1988), *citing Finn v. Prudential-Bache Securities, Inc.,* 821 F.2d 581 (11th Cir. 1987) and *Pettinelli, supra.*

> In construing a release agreement, the Court must look to the intent of the parties as expressed in the document itself. Where the intent can be ascertained from the unambiguous language of the instrument, construction of the document is a question of law for the Court. Further, where there is an ambiguity in the contract and the facts are not disputed, it is the province of the Court to resolve the ambiguity as a matter of law.

Mulhern v. Rogers, 636 F.Supp. 323, 325 (S.D.Fla. 1986) (citations to both federal and Florida cases omitted).

In the Agreement, the parties bound themselves to the following relevant representations, covenants, warranties and release:

Article II

> 1. *The Sellers' Representations.* As an inducement to PEC and Dreyfoos to enter into this Agreement and consummate the transactions contemplated hereby, the Sellers,[3] jointly and severally, represent, covenant and warrant to PEC and Dreyfoos the following. . . .
>
> (e) *Access to Information; Sophistication.* Prior to the date hereof, the Sellers and their legal and financial representatives have had the opportunity to ask questions and receive answers from PEC, its officers and directors concerning its financial condition and business prospects, have requested copies of or access to

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[3] "Sellers" is defined in the Agreement to be Ann A. Mergens, both individually and as Trustee for the Ann A. Mergens Revocable Trust, Mary Mergens and Paul Mergens.

certain documentation relating to PEC and its financial and business affairs and have received all of such copies or access so requested, including financial statements describing the existence and general terms of other PEC indebtedness. The Sellers are sophisticated and experienced in financial, business and investment matters, and, as a result, the Sellers are in a position to evaluate the merits and risks of a sale of the Shares and the tax consequences of such sale. The Sellers have had the advice and the assistance of legal counsel and an independent certified public accounting firm in connection with evaluating the transactions contemplated by this Agreement and the Related Documentation.

2. *PEC's and Dreyfoos' Representations.* As an inducement to the Sellers to enter into this Agreement and consummate the transactions contemplated hereby, PEC and Dreyfoos, jointly and severally represent, covenant and warrant to the Sellers the following. . . .

(h) *No Planned Initial Public Offerings or Stock Sales.* Neither PEC nor Dreyfoos has any current plans, has entered into any agreements or is conducting any present negotiations involving (i) a merger, consolidation, liquidation or dissolution of PEC, (ii) a public or private sale of stock in PEC or (iii) the sale of all, or substantially all, of PEC's assets, nor is there any present intention on the part of PEC or Dreyfoos to formulate any plans, enter into any agreements or conduct any negotiations involving the same.

Article III

1. *Affirmative Covenants.* For so long as any amounts remain outstanding under the Note, PEC and Dreyfoos agree to the following:

(a) *Survival of Representations and Warranties of PEC and Dreyfoos.* All representations, covenants and warranties of PEC and Dreyfoos made herein shall, with the exception of the representation and warranty set forth in Article II(2)(h) above [regarding, *inter alia,* the sale of PEC or its assets] survive the execution and delivery hereof.

2. *Negative Covenants.* For so long as any amounts remain outstanding under the Note, PEC and Dreyfoos covenant and agree that, without the prior written consent of the Sellers in writing, PEC and, with respect to Section 2(a)(iv) below, Dreyfoos will not do any of the following:

(a) *Merger, Dissolution Change of Ownership.* (i) Liquidate, wind up or dissolve, (ii) enter into or consummate any consolidation, merger, syndicate or other combination pursuant to which PEC is not the surviving entity, (iii) sell, lease or dispose of, in a single transaction or a series of related transactions, all or substantially all of PEC's television station business or assets or (iv) reduce the number of shares of Common Stock held or record and beneficially by, in the aggregate, Dreyfoos, his wife and his children below 75% of the total number of shares outstanding (excluding treasury shares).

Article IV

1. *Release by the Sellers.* The Sellers, for themselves and their assigns, heirs, representatives, executors, administrators, trustees and agents, hereby remise, release and forever discharge, [Alex] Dreyfoos, Carolyn B. Dreyfoos, Robert W. Dreyfoos, Catherine D. Carter, PEC and their respective assigns, representatives, legal successors, trustees, officers, directors, stockholders and agents (as the case may be) of and from all manner of actions and actions, claims, cause or causes of action, suits, debts, dues, sums of money, accounts, bills, specialties, covenants, contracts, controversies, agreements, demands whatsoever, in law or in equity, direct or indirect, the Sellers' [sic] ever had, now have or which the Sellers and/or their respective assigns, representatives, legal successors, trustees and agents can, shall or may have for, upon or by reason of any matter, cause or thing whatsoever, from the beginning of the world to the date hereof, including, specifically and without limitation, all claims and causes of action alleged by Mrs. Mergens as set forth in the draft complaint provided to Harrison K. Chauncey, Jr., Esq., by Jeffrey A. Stoops, Esq., by letter dated January 3, 1994.

Article V

3. *Binding Effect.* All of the terms and provisions of this Agreement, whether so expressed or not, shall be binding upon, inure to the benefit of, and be enforceable by the parties and their respective administrators, executors, legal representatives, heirs, successors and permitted assigns

> 13. *Entire Agreement.* This Agreement, the Related Documentation and any other agreements, instruments or documents contemplated hereby represent the entire understanding and agreement between the parties with respect to the subject matter hereof, and supersede all other negotiations, understandings and representations (if any) made by and between such parties.

Amended Complaint, Exhibit 1.[4]

The release contained in Art. IV.1 unambiguously bars the Mergenses from bringing any cause of action premised on a claim or action that occurred "from the beginning of the world to the date hereof," *i.e.* to January 17, 1994. The Mergenses base their claim of federal securities fraud on two misrepresentations. First, they claim that Dreyfoos and the other named Defendants to this cause of action artificially depressed "the cash flow position" of PEC and its subsidiaries in order to hide the true value of PEC. *Amended Complaint* ¶¶ 38-55. The Mergenses allege that they and their advisors in the stock repurchase transaction justifiably relied on the cash flow figures provided by the Defendants, that the Defendants knew that these figures were false and misleading, and that the Defendants intended that the Mergens would rely on these figures in appraising the value of PEC. *Id.* These alleged misrepresentations concerning the cash flow of PEC allegedly took place prior to the date of the Agreement as they allegedly formed the basis for the Mergenses's valuation of PEC. *Id.* ¶¶ 62, 69, 73 and 80.

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[4] "A copy of any written instrument which is an exhibit to a pleading is a part thereof for all purposes." Fed.R.Civ.P. 10(c).

The unambiguous language of the Agreement and its release at Art. IV.1 indicates that the parties to the Agreement intended to settle and release all legal claims arising out of actions taken prior to that date, ad therefore, the Mergenses's claim based upon an alleged misrepresentation of cash flow is barred by the release contained in the Agreement.[5]

Second, the Mergenses claims that Dreyfoos and the other named Defendants fraudulently misrepresented in the Stock Repurchase Agreement that they did not contemplate the sale of PEC or any of its assets, including WPEC-TV. *Amended Complaint* ¶¶ 38-55. This alleged misrepresentation may give rise to a claim of breach of contract, but since it is fully addressed in the written agreement at Art. II.2(h), any representations regarding the sale of PEC or its assets merge into the Agreement pursuant to Art. V.13 and no action for fraud will lie. *Petttinelli,* [sic] 722 F.2d at 709-710. That is, no prior

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[5] The Mergenses also seem to claim a misrepresentation as to the projected revenue and/or projected "cash flow" of PEC. *Amended Complaint* ¶¶ 45, 49, 52. An action for fraud does not lie when a misrepresentation is about a future fact, rather than a past or present fact. *Pettinelli,* 722 F.2d at 709 (citation omitted). However, Florida cases recognize an exception to this rule "where the promise to perform a material matter in the future is made without any intention of performing or made with the positive intention not to perform." *Vance v. Indian Hammock Hunt & Riding Club, Ltd.,* 403 So.2d 1367, 1372 (Fla. 4DCA 1981) (citation omitted). Even if this alleged misrepresentation regarding future cash flow does meet this exception and gives rise to a cause of action for fraud, it would be barred by the release for the same reasons the alleged misrepresentation regarding the current cash flow is barred.

representation regarding the sale of PEC of its assets can form the basis for a claim of fraud since any representation regarding the sale of PEC or its assets merges into the clause which addresses that issue. *Id.; see also,* discussion *infra* § II(D)(1). The Plaintiffs may have a cause of action for breach of contract on the representation made in the Agreement (the Court offers no opinion on the merits of such a claim), but they do not have an action for fraud.[6] *Id.*

The Eleventh Circuit's holding in *Pettinelli, supra,* that a representation contained in a contract gives rise only to a breach of contract claim and not to a fraud claim, is in accord with the general principles of tort and contract law that led the Florida Supreme Court to hold that a claim for fraud in the inducement is not barred by Florida's economic loss rule, a rule which normally bars tort damages that arise out of a breach of contract. *HTP, Ltd. v. Lineas Aereas Costarricenses, S.A.*, 685 So.2d 1238 (Fla. 1996). In holding to this exception to the economic loss rule, the Florida Supreme Court reasoned that fraud in the inducement is an independent act from the formation and nonperformance of the contract. *Id.* at 1239. Since this independent (allegedly fraudulent) act is not

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[6] Since the Plaintiffs have not pled any breach of contract claims, and since this Court will dismiss this cause of action for lack of jurisdiction, the Court need not reach the hotly contested issue of whether the affirmative covenant in Art. II.1(a), which states that the representation regarding the sale of PEC or its assets at Art. II.2(h) does not "survive the execution and delivery" of the Agreement, bars any breach of contract claim based on Art. II.2(h).

covered by the contract, no contractual remedy would lie and the aggrieved party must have access to a tort claim.

The fraud in the inducement exception to the economic loss rule encourages, *inter alia*, thoroughness in the drafting of contracts. Each party to a contract (presumably) hopes to avoid tort litigation over the contract and the sort of damages that can be recovered under tort claims. Therefore, each party will insist on placing all representations in writing, thus reducing any claims on those representations to a breach of contract action. In the instant case, the parties to the Agreement anticipated a possible sale of PEC or its assets, and drafted a representation accordingly at Art. II.2(h). The extent of that representation is not now before this Court, but the mere fact that it exists means that pursuant to Art. V.13 of the Agreement all representations regarding the sale of PEC or its assets merge with Art. II.2(h). Any alleged breach of Art. II.2(h) gives the Mergenses a cause of action in contract, but not in tort for fraud.

The Agreement the Mergenses entered in to with Dreyfoos and PEC bars the Plaintiffs' claims of federal securities fraud. The release bars the Plaintiffs' claim that Dreyfoos and PEC misrepresented the "cash flow" (and the "cash flow" projections) prior to the Agreement. The Plaintiffs' claim that Dreyfoos misrepresented his intent to sell PEC or its assets merges with Art. II.2(h) of the Agreement and gives rise only to a breach of contract claim.[7]

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[7] D.E. "Josh" Murray is an officer of PEC, and therefore any fraud claims against him are also barred by or merged into the

D. Fraud in the Inducement

Since the release and representations contained in the Agreement bar the Mergenses from bringing their federal securities fraud claims, the only question remaining is whether the Mergenses were fraudulently induced to enter into the Agreement as they allege in Court IV. They were not.

1. The Rule of Unjustifiable Reliance in *Pettinelli*

In *Pettinelli v. Danzig*, a shareholder brought a derivative suit against the corporation's officers and directors alleging violations of federal securities laws, common law breach of fiduciary duty, and common law fraudulent inducement to invest. 760 F.2d at 707. The defendants moved for, and the district court awarded, summary judgment in regards to all "actions or inactions" occurring before March 20, 1974, the date of a written "Agreement and Release" that settled all claims between the parties prior to that date. *Id.* at 707-708. The district court denied summary judgment as to events after that date. *Id.* at 708. The shareholders appealed on the grounds that, *inter alia*, they were fraudulently induced under Florida law to execute the 1974 release. *Id.* The Eleventh Circuit affirmed the holding of the district court.

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release and representations contained in the agreement. Any fraud claims against Carolyn B. Dreyfoos are barred by the terms of the release.

The Eleventh Circuit reviewed Florida law on the question of fraud in the inducement, and found that Florida requires the plaintiff to show that the defendant (1) made a false representation of fact, (2) that the defendant knew was false when made, (3) that was made for the purpose of inducing the plaintiff to act in reliance on it, and (4) on which the plaintiff had a right to rely. *Id.* at 709 (citations to federal and Florida cases omitted). Moreover, under Florida law, "the misrepresentation must be about a present or past fact rather than a future fact." *Id.*

The Eleventh Circuit held that the plaintiffs in *Pettinelli* had failed to carry their burden in two regards. First, the plaintiffs had failed to show that the defendants had made any material misrepresentation. *Id.* The plaintiffs maintained that the defendants had agreed to pursue legal remedies against a third party and had agreed to open the books of the corporation, neither of which the defendants had allegedly done. *Id.* The written settlement agreement entered into between the parties, however, had addressed both of these issues. *Id.* at 709-710. citing to Florida law, the court held that "any alleged representations made prior to the Release merge into the Release clauses that address the same terms or representations," and give rise to a breach of contract action, not a fraud action. *Id.* at 710; *see also,* discussion *supra* § II(C).

Second, the Eleventh Circuit held that even if the plaintiffs had showed material misrepresentation they had still failed to show justifiable reliance. *Id.* The court observed that the plaintiffs had been represented by counsel, that an adversarial relationship existed between the parties to the 1974 release agreement, that the plaintiffs had not insisted on examining the books of the

corporation prior to signing the release, and that the plaintiffs had not insisted on any specific representations in the contract as to the financial condition of the corporation. *Id.* In light of these circumstances, the Court held that under Florida law "[w]hen negotiating or attempting to compromise an existing controversy over fraud and dishonesty it is unreasonable to rely on representations made by the allegedly dishonest parties." *Id.* The court concluded that the plaintiffs "had no legal right to rely on any representations under these circumstances." *Id.*

After noting that "Florida law favors the finality of settlements," the Eleventh Circuit affirmed the district court in its granting of summary judgment to the defendants for actions that took place prior to the 1974 Agreement and Release signed by the parties, but the court "emphasize[d] that performance under or breach of the terms of the Release, and any fraud after the Release date, may still be litigated." *Id.*

2. *Pettinelli* as Applied by Later Courts

The rule in *Pettinelli* as to unjustifiable reliance has been vigorously enforced in both the Eleventh Circuit and in this District. In *Finn v. Prudential-Bache Securities, Inc.*, an Illinois farmer and his wife lost their life savings through risky investments engaged in without their knowledge by their broker at Prudential-Bache Securities. 821 F.2d 581, 583 (11th Cir. 1987). When the Finns discovered their losses, they called a lawyer. *Id.* Prudential-Bache Securities insisted that the broker had engaged in no legal wrongdoing, and told the Finns that they could either liquidate their account with Prudential-Bache or

sign a settlement agreement releasing all their claims against Prudential-Bache and the broker. *Id.* In return for the Finns signing the settlement agreement and release, Prudential-Bache agreed to carry the Finns's losses in the hopes that they would recoup their investments and to give them $30,000.00 in cash outright. *Id.* Faced with the liquidation of their account, the Finns signed the agreement. *Id.* at 584.

Six months later, Prudential-Bache liquidated the account anyway at a loss to the Finns of Approximately $400,000.00. *Id.* The Finns sued, alleging federal securities violations under 15 U.S.C. 78j(b) and Rule 10b-5 promulgated thereunder.[8] *Id.* The district court entered summary judgment in favor of the defendant on the grounds that the Finns's claims were barred by the release they had signed. *Id.* at 585. The district court also rejected the Finns's argument that the release should not bar their claims because Bache fraudulently induced them into signing the release and because Bache exerted economic duress on them. *Id.* The Finns appealed. The Eleventh Circuit affirmed the district court on its summary judgment as to the fraud claim, but reversed it as to the Finns's economic duress claim. *Id.* at 586-588. In affirming the district court as to fraud in the inducement claim, the Eleventh Circuit held that since the Finns were represented by legal counsel, were in an adversarial relationship with Prudential-Bache regarding fraud or dishonesty, and were attempting to settle the existing controversy when they entered into the settlement, the

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[8] The same Statute and Rule under which the Mergenses bring their federal securities claims.

rule in *Pettinelli* held and "[u]nder Florida law, the Finns had no right to rely on Bache's representations. . . . " *Id.* at 586. The release, therefore, barred their claims. *Id.* Judge Brown dissented on the majority's holding as to the fraud in the inducement claim arguing that given the broker-client relationship, the court should not quickly assume that the Finns viewed their broker as an adversary, as opposed to a fiduciary, even through the broker lost the Finns almost their entire retirement account. *Id.* at 588-589 (Brown, J., dissenting).

The rule in *Pettinelli* has also been regularly applies in this District. *See, e.g. Hall v. Burger King Corp.*, 912 F.Supp. 1509, 1524-1525 (S.D.Fla. 1995) (relying on *Pettinelli*, the court granted summary judgment to defendant as to plaintiffs' fraudulent inducement claim on the grounds that the plaintiff, under Florida law, was not justified in relying on the representations of defendant where plaintiff was represented by counsel, was in a hostile or adversarial relationship with defendant, and where relationship was "plagued with distrust" such that plaintiff secretly tape recorded defendant's annual meeting and any conversation plaintiff had with defendant's employees); *Jankovich v. Bowen*, 844 F.Supp. 743, 747-748 (S.D.Fla. 1994) (relying on *Pettinelli*, the court held that "release agreement acts retroactively to release all claims arising out of conduct that occurred prior to the execution of release;" relying on *Pettinelli*, the court dismissed claims of fraudulent inducement, fraud, and negligent misrepresentation on the grounds that, *inter alia*, (1) since alleged misrepresentations merged into the release clause that addressed that same representation, there was no material misrepresentation, and (2) since parties were in

an adversarial relationship due to counterclaimants' charges of misappropriation and because settlement and release agreement was executed to settle that dispute, the counterclaimants could not have reasonably relied on the counterdefendants' representations; the court also noted that "[i]f the alleged misrepresentations were included in the contract and were not performed, then an action for breach of contract would lie"); *Zelman v. Cook*, 616 F.Supp. 1121, 1133 (S.D.Fla. 1985) (relying on *Pettinelli*, court entered judgment for defendants on fraudulent inducement claim regarding release in securities fraud case because plaintiff was represented by counsel, was in an adversarial relationship with the defendants, knew from prior dealings with the defendants that he could not rely on their statements as evidenced by the plaintiff's prior demand to inspect corporate records and his secret taping of the annual shareholders meeting, and failed to make any inquiries regarding the alleged misrepresentations). *See also, Ungerleider v. Gordon*, 936 F.Supp. 915, 916 (M.D.Fla. 1996) (relying on *Pettinelli* for, *inter alia*, the proposition that where the parties in executing a release agreement were represented by counsel in a "palpabl[y]" adversarial relationship, the plaintiff could not claim fraud in the inducement for the defendant's refusal to disclose the identity of a potential investor).

3. *Pettinelli* as Applied to this Cause of Action

The Mergenses represented in Art. II.1(e) of the Agreement that they were sophisticated sellers, represented by both legal counsel and certified public

accountants. At the time the Agreement was signed, the Parties had been in an adversarial relationship since at least 1992 when the Mergenses commissioned an independent valuation of PEC. *Amended Complaint* ¶ 22. Prior to entering into the Agreement with Dreyfoos and PEC, the Mergenses had threatened Dreyfoos and PEC with two suits. The first threatened suit was a shareholder's action for access to corporate information. *Id.* ¶ 17. In response, Dreyfoos turned over PEC's books and records which the Mergenses claim were incomplete. *Id.* In the second suit, a draft complaint of which was prepared by the Mergenses's lawyer and sent to Dreyfoos's lawyer on January 3, 1994, the Mergenses accused Dreyfoos of, *inter alia*, fraud. *Id.* ¶ 18. According to the Mergenses, the Parties entered in to the Agreement and the release, in part, to settle this threatened lawsuit. *Id.* ¶ 18 ("[i]n order to prevent the filing of the threatened lawsuit, Dreyfoos entered into . . . [the] Stock Repurchase Agreement"), Exhibit 1 (the Agreement) Art. IV.1 (releasing all claims against Dreyfoos as set forth in the draft complaint).

Moreover, although the Mergenses represented in Art. II.1(e) of the Agreement that they were sophisticated sellers and that their advisors had access to documents describing the "financial condition and business prospects" of PEC, the Mergenses failed, despite being represented by counsel, to obtain any representation from Dreyfoos or PEC that the financial information that Dreyfoos and PEC provided the Mergenses was complete and accurate. In appraising the value of PEC, the Mergenses relied on two reports. The Mergenses's certified public accountant, Price Waterhouse, specifically noted in its report, prepared in June of 1992, that the information in

its report was accurate only through March 31, 1992. *Amended Complaint*, Exhibit 2. Similarly, Merrill Lynch specifically noted in its report, prepared at the request of Dreyfoos and PEC and provided to the Mergenses, that the information contained in its report was accurate as of May 31, 1993. *Id.*, Exhibit 3. Both Price Waterhouse and Merrill Lynch also noted in their reports that they were relying on the accuracy and completeness of the financial information provided to them by Dreyfoos and PEC. *Id.* ¶¶ 42-43, Exhibits 2 and 3. Nonetheless, the Mergenses relied on these two stale reports, in which both Price Waterhouse and Merrill Lynch explicitly warned that the accuracy of their appraisals depended on the accuracy and completeness of the financial information given them by Dreyfoos and PEC, and did not inquire any further.

Given the hostile and antagonistic relationship between the Mergenses and Dreyfoos and PEC, given that the Mergenses were represented by both legal counsel and certified public accountants, given that the Mergenses were on notice that the stale appraisals upon which they were relying were dependent on the accuracy and completeness of the financial information provided to the accountants by Dreyfoos and PEC, and given that the Mergenses and Dreyfoos and PEC entered into the Agreement to settle an existing controversy over fraud, the Mergenses "had no legal right to rely on any representations under the circumstances."[9] *Pettinelli*, 722 F.2d at 710.

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[9] The Plaintiffs vigorously argue that they relied on omissions, as opposed to misrepresentations, and that this makes the rule in *Pettinelli* inapposite to this cause of action. The lesson of *Pettinelli*, however, is that under the circumstances

C. The Remaining Common Law Claim – Breach of Fiduciary Duty

The Court will decline to exercise its supplemental jurisdiction over the Plaintiffs' common law claim for breach of fiduciary duty, and the claim will be dismissed without prejudice. 28 U.S.C. § 1367(c)(3).

III. CONCLUSION

"Judgment on the pleadings is proper when no issues of material fact exist, and the movant is entitled to judgment as a matter of law." *Ortega*, 85 F.3d at 1524. As it is required to do, the Court has accepted the Plaintiffs' facts in the Amended Complaint as true, and has viewed them in a light most favorable to the Plaintiffs. *Id.* Nonetheless, as a matter of law, the Defendants are entitled to judgment on the pleadings as to Counts I, II, III and IV.

The Court will grant the Defendants' Motion for Judgment on the Pleadings as to the Plaintiffs' federal securities law claims, Counts I, II and III, on the grounds that the release and representations in the Agreement entered into between the Parties bars the Plaintiffs from

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discussed *supra*, the plaintiff is not entitled to rely on the defendant for any type of representation, including representation by omission.

The Plaintiffs also argue that under Florida law a party is justified in relying on statements the truth of which is unascertainable. Again, *Pettinelli* stands for the proposition that a plaintiff under the circumstances discussed *supra* is not justified in relying on the defendant for any representation, regardless of whether the truth of the representation is ascertainable.

bringing a cause of action based on actions or omissions taken prior to the Agreement. The Court will grant the Defendants' Motion for Judgment on the Pleadings as to the Plaintiffs' common law claim for fraud in the inducement, Count IV, on the grounds that under *Pettinelli, supra*, the Plaintiffs unjustifiably relied on the Defendants' alleged misrepresentations. The Court will dismiss without prejudice the Plaintiffs' common law claim for breach of fiduciary duty, Count V, for lack of jurisdiction.

This Order does not adjudicate any claims that arise either on the contract or arise from actions or omissions taken after the Parties entered into the Agreement.

THE COURT has considered the Motion, and the pertinent portions of the record, and being otherwise fully advised in the premises, it is

ORDERED AND ADJUDGED that the Defendants' Motion for Judgment on the Pleadings [DE-76] be, and the same is hereby, GRANTED as to Counts I, II, III, and IV, and DENIED WITHOUT PREJUDICE as to the Plaintiffs' state law breach of fiduciary duty claim, Count V.

DONE AND ORDERED in Chambers at West Palm Beach, Florida, this 18 day of July, 1997.

/s/ Kenneth L. Ryskamp
KENNETH L. RYSKAMP
UNITED STATES DISTRICT JUDGE

copies provided:
Gerald F. Richman
James W. Beasley

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 97-5412

ANN A. MERGENS, individually, and as Trustee for the Ann A. Mergens Revocable Trust; et al., — Plaintiffs-Appellants, Cross-Appellees.

versus

ALEX W. DREYFOOS, JR.; PHOTO ELECTRONICS CORPORATION, a Florida Corporation; et al., — Defendants-Appellees. Cross-Appellants.

On Appeal from the United States District Court for the Southern District of Florida

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(Filed Apr. 02, 1999)

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC

(Opinion _____, 11th Cir., 19__, ___ F.2d ___).

Before: ANDERSON and DUBINA, Circuit Judges, and FAY, Senior Circuit Judge.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ Peter Fay
SENIOR UNITED STATES CIRCUIT JUDGE

APPENDIX D

United States Code, Title 15

§ 78j. Manipulative and deceptive devices

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange –

* * *

(b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

(June 6, 1934, c. 404, Title I, § 10, 48 Stat. 891.)

APPENDIX E

CODE OF FEDERAL REGULATIONS TITLE 17 – COMMODITY AND SECURITIES EXCHANGES MANIPULATIVE AND DECEPTIVE DEVICES AND CONTRIVANCES

§ 240.10b-5 Employment of manipulative and deceptive devices.

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange.

(a) To employ any device, scheme, or artifice to defraud,

(b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

(c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security.

(Authority: Sec. 10; 48 Stat. 891; 15 U.S.C. 78j)

[13 FR 8183, Dec. 22, 1948, as amended at 16 FR 7928, Aug. 11, 1951]

Supreme Court, U.S.
FILED
JUL 8 1999
OFFICE OF THE CLERK

(2)

No. 98-1974

IN THE

Supreme Court of the United States

ANN A. MERGENS, individually, and as Trustee for the Ann A. Mergens Revocable Trust, MARY MERGENS LOUGHRAN and PAUL MERGENS,

Petitioners,

v.

ALEX W. DREYFOOS, JR., PHOTO ELECTRONICS CORPORATION, a Florida corporation, CAROLYN B. DREYFOOS, D.E. "JOSH" MURRAY, and PHOTO ELECTRONICS COMPANY, L.P.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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PARTIES TO THE PROCEEDING

Pursuant to Sup. Ct. R. 14.1(b), Respondents list below all parties to the proceeding in the Court of Appeals:

(1) The Ann A. Mergens Revocable Trust

(2) Dreyfoos, Alexander W., Jr.

(3) Dreyfoos, Carolyn B.

(4) Loughran, Mary Mergens

(5) Mergens, Ann A.

(6) Paul Mergens

(7) D.E. "Josh" Murray

(8) Photo Electronics Corporation

(9) Photo Electronics Corporation, L.P. (a limited partnership)

Respondent, Photo Electronics Corporation, has no parent corporation and no publicly held company owns 10% or more of its stock.

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STATEMENT OF THE CASE

A. Procedural History

On December 28, 1995, Petitioners sued Respondents in the Southern District of Florida. Respondents answered, denying all material allegations of the Complaint. Respondents moved for judgment on the pleadings, based on the general release attached to the Complaint. The District Court granted judgment on the pleadings as to Counts I, II, III and IV, which were claims for federal securities law violations and common law fraud. (Count V, for common law breach of fiduciary duty, was dismissed for lack of federal jurisdiction.) *See Mergens v. Dreyfoos*, 1997 WL 611576 (S.D. Fla. 1997); (Pet. App. B at 36a). Petitioners appealed. The Eleventh Circuit affirmed, denied rehearing, and denied Petitioners' suggestion for rehearing *en banc*. *See Mergens v. Dreyfoos*, 166 F.3d 1114 (11th Cir. 1999); (Pet. App. C at 37a-38a).

B. Statement of the Facts

The Petitioners provide an incomplete statement of the facts. The opinions of the District Court and the Eleventh Circuit more fairly set forth the facts, which Respondents briefly summarize below.

George Mergens, the long-time business partner of Respondent Alexander W. Dreyfoos, Jr., died in 1986. The primary business venture in which Dreyfoos and Mergens were involved was the ownership of Photo Electronics Corporation ("PEC"), whose principal asset was television station WPEC-TV, in West Palm Beach, Florida. The

Petitioners are George Mergens' heirs, who inherited his PEC stock.

According to Petitioners' Complaint, after George Mergens' death, Dreyfoos embarked on a new strategy to force the Mergens to transfer to him their interest in PEC. The Mergens claimed that for years they "hounded" Dreyfoos for information about PEC, and obtained access to such information only after threatening litigation. The Mergens concluded that Dreyfoos was guilty of "mismanagement and fraud." (Petition at 4).

The Mergens' lawyers sent Dreyfoos a threatening letter on January 3, 1994. A 43-page draft complaint containing extensive accusations of fraud and dishonesty was enclosed; the letter stated that the complaint would be filed if Dreyfoos did not purchase the Mergens' PEC stock at the price they demanded.

Dreyfoos agreed to a settlement in order to avoid the threatened lawsuit. The parties entered into a detailed agreement (the "Settlement Agreement") on January 17, 1994, "as a means of resolving their dispute . . ." (Petition at 4). Under the terms of the Settlement Agreement, Dreyfoos paid the Petitioners $14.5 million for their PEC shares ($3 million in cash, and $11.5 million in a note). In exchange, the Mergens gave a general release covering "any claims" that the Mergens "ever had, now have . . . shall or may have, from the beginning of the world to the date [of the Agreement]".

The general release specifically included the causes of action for fraud and breach of fiduciary duty contained in the draft complaint. In the Settlement Agreement, the

Mergens specifically represented that they were sophisticated, that they had access to all relevant information that they had requested, and that they had obtained the advice of legal counsel and an independent certified public accounting firm in connection with the transactions contemplated by the Agreement. The Agreement contained a merger clause, which provided that there were no representations other than as set forth in the Agreement. The Agreement specified that it was governed by Florida law. Dreyfoos subsequently paid the full price of $14.5 million to the Mergens.

In the fall of 1995, a year and a half after the stock sale, the Mergens learned that WPEC was being sold for a substantial sum. The Mergens demanded rescission of the Settlement Agreement. Dreyfoos declined, and this lawsuit followed in December 1995. In their Complaint, to which the Settlement Agreement was attached, the Mergens alleged that Dreyfoos had fraudulently induced them to sell their stock at a price below its true value.

C. The District Court's Decision

On July 18, 1997, the District Court ruled that as a matter of law, Dreyfoos was entitled to judgment on the pleadings as to the claims of federal securities law violations and common law fraud. The District Court held that the general release contained in the Settlement Agreement barred these claims, and that the release could not be invalidated on the grounds of alleged fraudulent inducement. The decision was based on the facts that the Mergens were sophisticated parties; they were represented by legal counsel and financial advisors; and they settled their claims of fraud and dishonesty after a long adversarial

relationship. *See* Pet. App. B at 32a-34a. The District Court relied primarily upon on the Eleventh Circuit's opinions in *Pettinelli v. Danzig*, 722 F.2d 706 (11th Cir. 1984) and *Finn v. Prudential-Bache Securities, Inc.*, 821 F.2d 581 (11th Cir. 1987).

The Settlement Agreement provides that it is governed by Florida law. In the District Court, the Mergens relied upon Florida common law for the proposition that a release procured by fraud may be, under certain circumstances, invalidated.[1] The Mergens did not contend that federal law governed the validity of their general release.

D. The Eleventh Circuit's Opinion

On February 3, 1999, the Eleventh Circuit affirmed the District Court's decision, holding (1) that the general release barred all claims; and (2) the general release could not be set aside on grounds of fraudulent inducement. The Eleventh Circuit relied on its controlling precedent in *Pettinelli* and *Finn*.

In a footnote to their Eleventh Circuit brief, the Petitioners had noted that "*Pettinelli* has been criticized for applying Florida law in determining the effectiveness of a release of federal securities claims." (Brief of Appellants at 20, n.7). However, in the next footnote, the Petitioners also relied upon state law to attack the release. (*Id.* at 22,

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1. Petitioners assert that the District Court "effectively held" that a release is valid even if it was procured by fraud. (Petition at 6). This is incorrect. The District Court's opinion contains a detailed analysis of the claim of fraudulent inducement of the release. *See* Pet. App. A at 5a-10a.

n.8). Petitioners did not assert as a point on appeal that federal law should govern the issue of the validity of the general release.

In its opinion, the Eleventh Circuit noted that it was applying Florida law to the release, consistent with the provisions of the Settlement Agreement. *See* Pet. App. A at 10(a). The Mergens filed motions for rehearing and rehearing *en banc* that were denied, and this Petition for a Writ of Certiorari followed.

REASONS FOR DENYING THE WRIT

I.

THERE IS NO CONFLICT AMONG THE CIRCUITS.

The court below held that where a releasor is sophisticated, is represented by counsel and financial advisors, and settles claims of fraud and dishonesty after a long-standing hostile and adversarial relationship, a claim of fraudulent inducement of a general release is precluded as a matter of law. In these circumstances, the releasor cannot claim justifiable or reasonable reliance upon the adversarial party that the releasor is simultaneously accusing of dishonesty.

No Circuit Court of Appeals has ever held to the contrary. The decision below is not in conflict with the decisions of any other circuit, nor is it "idiosyncratic and unwise." (Petition at 9).

The conflict claimed by Petitioners is at best an abstract one: that the court below should have applied federal law. A footnote in the Petition contends that federal law would result in a different outcome, but the only case offered, *Burgess v. Premier Corporation*, 727 F.2d 826 (9th Cir. 1983) is factually inapposite. *See* Petition at 10, n.6. In *Burgess*, there is *no* indication that the releasors were sophisticated, were acting with advice of counsel, or that they were settling fraud claims in the context of a hostile and adversarial relationship.[2]

Petitioners' conflict cases are equally unpersuasive.

The Ninth Circuit is not in conflict with the Eleventh Circuit. In *Petro-Ventures, Inc. v. Takessian*, 967 F.2d 1337 (9th Cir. 1992), the parties released each other from all prospective causes of action in a comprehensive settlement. Six months later, one of the releasing parties filed suit against a released party alleging federal securities law violations. The Ninth Circuit upheld the release (rejecting the same arguments which the Petitioners make here), and relied on the Second Circuit (which in turn relied on New York law):

> The parties here . . . were not so concerned with protecting their rights as investors as they were with establishing a general peace. See C.G.C. Music., Ltd., 804 F.2d at 1463 ("[T]he Release firmly evidences the parties' intent to end their

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2. *Burgess*' quotation from *Royal Air Properties, Inc. v. Smith*, 333 F.2d 568 (9th Cir. 1964), also cited in footnote 6 of the Petition, shows the weakness of Petitioners' contention. *Royal Air Properties* does not even concern releases.

various disputes . . . once and for all."). We agree with the Second Circuit that

> [w]hen, as here, a release is signed in a commercial context by parties in a roughly equivalent bargaining position and with ready access to counsel, the general rule is that, if 'the language of the release is clear, . . . the intent of the parties [is] indicated by the language employed.'
>
> *Locafrance* [*U.S. Corp. v. Intermodal Sys. Leasing, Inc.*, 558 F.2d 1113, 1115 (2nd Cir. 1977)] (quoting *In re Schaefer*, 18 N.Y.2d 314, 317, 274 N.Y.S.2d 869, 872, 221 N.E. 2d 538, 540 (1966)).

Petro-Ventures recognized that "other circuits have not applied the federal policy against the release of unknown or subsequently maturing causes of action *without considering the circumstances in which a right was released.*" *Id.* at 1342 (*emphasis added*). Such circumstances are the core of the Eleventh Circuit's *Pettinelli/Finn* line of cases that were the foundation of the decision below.

The Second Circuit is not in conflict with the Eleventh Circuit, as indicated by the quotation above from *Petro-Ventures*. In *Locafrance*, the Second Circuit held that a general release barred federal securities law claims, citing New York law. *Locafrance*, 558 F.2d at 1115.

Similarly, there is no conflict between the Sixth Circuit and the Eleventh Circuit. In *Street v. J.C. Bradford & Co.*, 886 F.2d 1472, 1483 (6th Cir. 1989), the court held that the "federal law of release between fiduciary and beneficiaries" required reversal of a summary judgment based on a release. However, the Sixth Circuit expressly found *no* conflict with the position of the Eleventh Circuit as expressed in *Finn*. *Id.* at 1482. Unlike the plaintiffs in *Finn*, the plaintiffs in *Street* were *not* in an adversarial relationship with the releasee, and were *not* represented by counsel. As to the claim that the release was voidable because of duress, the Sixth Circuit noted that it relied on "federal principles," whereas *Finn* relied on state law as to this issue, but that the substantive result was the same.[3]

Moreover, this Court's decision in *Dice v. Akron, Canton & Youngstown R. Co.*, 342 U.S. 359 (1952) poses no conflict with the decision below. In *Dice*, this Court held that where a railroad fireman was induced to sign a release by a deliberately false statement that the document was only a receipt for back wages, a jury verdict for the fireman could not be set aside on the grounds that the release was immune from a claim of fraud. The factors motivating the holding in *Dice*, uniform standards for injured railroad employees under the Federal Employer's Liability Act, are not present in this case, which involves a release agreed to by a sophisticated party, with advice of counsel, settling claims

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3. The Sixth Circuit has applied Ohio law to govern the interpretation of a release that was argued to release federal claims under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), 42 U.S.C. §§ 9601 *et seq.* (1980); *see AM International, Inc. v. International Forging Equipment Corp.*, 982 F.2d 989 (6th Cir. 1993).

of fraud arising from a long adversarial and hostile relationship.

The Ninth Circuit has explained the relationship between federal law and state law in the context of a release of a federal claim (under CERCLA). *See Mardan Corp. v. C.G.C. Music, Ltd.*, 804 F.2d 1454 (9th Cir. 1986). Federal law governs the issue of releases of federal causes of action (citing *Dice*). *Id.* at 1457. But that is only the initial step. "The next step is to determine whether, although federal law governs, state law should be incorporated to provide the content of that federal law." *Id.* The fact that federal law governs does not mean that a uniform federal rule need be fashioned. "Frequently, state rules of decision will furnish an appropriate and convenient measure of the governing federal law." *Id.* at 1458. Numerous cases from this Court were relied upon by the Ninth Circuit, including *United States v. Kimball Foods, Inc.*, 440 U.S. 715 (1979), which held that "state law may be incorporated as the federal rule of decision," particularly in cases involving commercial relationships "predicated on state law." *Id.* at 728-29. Here, the Settlement Agreement containing a Florida choice of law provision is just such a commercial relationship predicated on state law. No federal interest was frustrated by applying the parties' own choice of law.

Thus in the case of a release executed in a commercial context, the Ninth Circuit held that state law provides an appropriate body of law to be incorporated into federal law: "Because New York law on releases does not in any way appear to be aberrant or hostile to federal interests, we apply New York law in interpreting the Settlement Agreement and the Release." *Mardan*, 804 F.2d at 1460.

That approach is consistent with the Eleventh Circuit's application of Florida law; particularly where, as here, the claim of federal law was not raised at all in the District Court, and only tangentially in the Court of Appeals.[4]

Finally, the Eleventh Circuit's decision was not "unwise." As other Circuit Courts of Appeal have recognized, any rule other than that applied below would create an endless circle of litigation precluding finality of settlements: "[Plaintiff] who at all times believed that defendants were misrepresenting his entitlement to benefits, should not be permitted to strike a better bargain at this late date by claiming that he signed the agreement in reliance on defendants' misrepresentations." *Finz v. Schlesinger*, 957 F.2d 78, 83 (2nd Cir. 1992) (upholding waiver of ERISA benefits). As the Second Circuit concluded in another case:

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4. As Petitioners concede, the Eleventh Circuit understands that federal law governs releases of federal claims. *See, e.g., Parker v. DeKalb Chrysler Plymouth, Inc. v. Rule Industries, Inc.*, 7 F.3d 986, 993 (11th Cir. 1993). However, as discussed above, that is only the beginning, not the end, of the analysis of whether state law should be applied.

Moreover, in the two earlier cases in which the Eleventh Circuit applied state common law to determine whether releases covering federal securities law claims were fraudulently induced, no federal law issue was raised. In the first case, the appellants (plaintiffs below) specifically invoked Florida law, not federal law. *See Pettinelli*, 722 F.2d at 708. In the second case, there was likewise no contention by any of the parties that federal law should be applied to determine whether a release containing a Florida choice of law provision was fraudulently induced. *See Finn*, 821 F.2d at 586. Similarly, the federal law issue was not properly raised below or preserved in this case.

> [P]laintiffs' argument is, in essence, that where the parties have sought to settle a claim of fraud, they cannot be bound by a settlement agreement unless the alleged defrauder has made full disclosure to the other party prior to settlement. We know of no authority to that effect, and we find the contrary principle established by *Alleghany Corp. v. Kirby*, 333 F.2d 327 (2d Cir.1964), *aff'd on rehearing*, 340 F.2d 311 (1965) (en banc; per curiam), *cert. dismissed*, 384 U.S. 28, 86 S. Ct. 1250, 16 L. Ed. 2d 335 (1966).

Bellefonte Re Insurance Company v. Argonaut Insurance Company, 757 F.2d 523, 527 (2nd Cir. 1985) (alleged fraudulent procurement of reinsurance contracts which were part of litigation settlement).

II.

PETITIONERS' FEDERAL LAW ARGUMENTS WERE NOT PROPERLY RAISED BELOW.

The Petition should also be denied because the Petitioners' federal law arguments are procedurally barred.

In the District Court, the Mergens did not contend that the validity of their general release was governed by federal law rather than by state law. *See* Question Presented, Petition at 1. In fact, the Mergens urged the District Court to apply Florida law to invalidate the release. Plainly, the federal law issue was not preserved in the District Court and was therefore waived.

In the Eleventh Circuit, the federal law issue was not a point on appeal in the Petitioners' brief.[5] On the contrary, the Petitioners again urged the Eleventh Circuit to apply Florida law to invalidate their release. The sole references in the brief to the possible applicability of federal law were in footnotes. Such passing references cannot be the basis for a claim on direct appeal, much less the basis for a petition for certiorari:

> Reference to a claim in a footnote, without its having been identified in the manner required by rule 28 as one of the issues presented for review, as part of the argument, and as part of the relief sought, would be insufficient to present the claim for review on direct appeal.

United States v. Restrepo, 986 F.2d 1462, 1463 (2nd Cir. 1993).

The Eleventh Circuit's footnote, disposing of the issue raised in Petitioners' footnote, hardly constitutes a "holding"

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5. All of the points on appeal sought to distinguish *Pettinnelli*:

   I. *Pettinnelli* Does Not Bar a Fraud Claim Based on a Misrepresentation Set Forth in the Parties' Written Agreement

   II. *Pettinnelli* Does Not Apply to Misrepresentations Made to Third Parties With Whom the Fraudfeasor is not an Adversarial Relationship

   III. *Pettinnelli* Does Not Apply to a Fraud Claim Based on Omissions

See Brief of Appellants at ii.

that warrants *certiorari* review. Most importantly, the question presented by the Petitioners is purely hypothetical. Under any body of law — Florida or federal — the result would not change.

CONCLUSION

For these reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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